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State of Washington's Reply and Answer to Amici Briefs (Redacted)

REDACTED

NO. 84362-7

SUPREME COURT OF THE STATE OF WASHINGTON

MATHEW and STEPHANIE McCLEARY, et al.,

Respondents,

v.

STATE OF WASHINGTON,

Appellant.

STATE OF WASHINGTON'S REPLY AND ANSWER TO AMICI BRIEFS

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I. INTRODUCTION

The State has achieved compliance with article IX, section 1 of the Washington Constitution by implementing and fully funding the education reforms that this Court endorsed in 2012. The Legislature has increased funding for K-12 education from $13.4 billion in the 2011-13 biennium to $26.6 billion in the 2019-21 biennium—well beyond what enrollment and inflation would have required. Having obtained what they sought—full state funding of basic education, Plaintiffs now seek to move the target.

This Court and the Legislature have consistently understood that implementing the reforms adopted in ESHB 2261 (Laws of 2009, ch. 548) and SHB 2776 (Laws of 2010, ch. 236, § 2) would achieve full compliance with article IX, section 1. Perhaps because the State has now reached this goal, Plaintiffs and Amici now claim that these fully implemented and fully funded basic education reforms are inadequate. In their view, no funding allocation model could be constitutionally valid because any such model necessarily imposes constraints on local spending. Plaintiffs want reimbursement, not allocation.

Plaintiffs and the State agree on many principles. Constitutional rights matter. The Court should uphold the law. No one is above the law. But none of these principles leads to the conclusion that the State has failed to achieve constitutional compliance. Nor do they support Plaintiffs'

premise that the "actual cost" of basic education is defined by school districts' expenditures and must be funded without constraint by the State. That is not the mandate of article IX, section 1.

The State's funding of basic education is based on evidence the Legislature has gathered and reviewed over a course of years, incorporates information about current spending needs, and contains provisions designed to maintain adequacy over time. EHB 2242 (Laws of 2017, 3d Spec. Sess., ch. 13) phases in full state funding for the State's program in a choreographed sequence that is fully complete by the 2019-20 school year. This legislation brings the State into compliance with article IX, section 1.

II. ARGUMENT

A. With the Enactment of EHB 2242, the State Has Enacted Legislation That Amply Funds the State's Program of Basic Education

In the five years since 2012, the State has annually reported its progress in working to come into compliance with article IX, section 1. Each time, Plaintiffs have ignored the State's progress, rejected its use of an allocation model, and accused the State of neglecting education. The State nevertheless continued its progress toward full implementation and funding. Now, with the enactment of EHB 2242, the State has achieved compliance, but Plaintiffs' arguments have not changed.

But the posture of this case *has* changed. EHB 2242 fully implements and funds ESHB 2261—and it also does more. EHB 2242 enacts additional comprehensive funding reforms that qualitatively and quantitatively increase state support for basic education. It allocates funding to support more staff, provides state funding to pay market rate salaries and benefits for all staff providing basic education services, provides state funding that is fully sufficient to support the State's program of basic education, and adds revenue sources to help pay for the additional funding. Qualitatively, these reforms add and fund *more instructional services* to the State's program of basic education. Quantitatively, these reforms add *more salary funding* to fully fund salary costs for the State's preexisting and new instructional services.

The comprehensive funding reforms enacted in EHB 2242 meet the constitutional standard this Court set out in 2012: they provide or are reasonably likely to provide fully sufficient state funding for the State's program of basic education. *McCleary v. State*, 173 Wn.2d 477, 519, 269 P.3d 277 (2012).

B. EHB 2242 Fully Implements the Funding Reform Legislation This Court Endorsed in 2012

In its 2012 decision, the Court endorsed the reform legislation initiated by ESHB 2261 as an appropriate remedy, provided its reforms

were implemented. *McCleary*, 173 Wn.2d at 543-46.[1] ESHB 2261 accounts for actual costs through a prospective allocation model rather than through reimbursement of school district expenditures. The model uses an evidence-based approach to funding adequacy to identify which interventions benefit student achievement and then attaches a dollar figure to those interventions. *McCleary*, 173 Wn.2d at 542; *see also 2014 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation* at 41-50 (Apr. 30, 2014) (*2014 Report*) (giving examples of evidence used to calibrate and update the model). And the State indeed does contend that, with the enactment of EHB 2242, it has determined the actual costs of providing the State's program of basic education and is funding those costs.[2]

Plaintiffs and Amici nevertheless continue to argue as if the Court ordered the State to implement an unconstrained reimbursement model rather than the reformed allocation formulas embodied in ESHB 2261. Under their model, the State would be obligated to pay whatever amount of

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[1] ESHB 2261 also was endorsed by "educators, school districts and by state and local officials," including members of NEWS (a Plaintiff herein). CP 2935 (Trial Court's Revised Findings of Fact and Conclusions of Law, FF 249); *see also McCleary*, 173 Wn.2d at 543-44 (quoting Superintendent of Public Instruction).

[2] As the Court recognized in 2012, the prototypical school model is designed to determine and fund the actual costs of providing the State's program of basic education. *McCleary*, 173 Wn.2d at 542. In prior years following the Court's 2012 decision, the State has acknowledged that the model has not been fully funded, although individual parts of the model have been fully implemented according to the schedule enacted in SHB 2776. This year is different—EHB 2242 fully implements the model and fully funds the State's program of basic education.

money each of the 295 independent school districts has expended. That is not a model for financial or educational accountability, and it has not been mandated by the Court.[3]

C. The Enactment of EHB 2242 Was the Product of Sustained and Extensive Legislative Consideration and Debate

EHB 2242 was not created out of whole cloth at the last minute, as Plaintiffs and Amici suggest.[4] It is the product of a years-long legislative dialogue and deliberation, and its antecedents are readily identifiable. For example, several bills in 2015 included a salary regionalization component as part of a proposed new salary allocation model,[5] at least one included both a hold harmless provision and required periodic labor market analyses as part of a new salary allocation model,[6] and various bills proposed alternatives for more effectively distinguishing basic education (funded by the State) from enhancements outside the program of basic education

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[3] The State is unaware of any government funding program that does not cap or otherwise constrain reimbursement. A capped reimbursement program presumably would not satisfy Plaintiffs and Amici because it, like the prototypical school model, would not allow school districts use their own expenditures to set the level of state funding they would receive.

[4] *See* Pls./Resp'ts' 2017 Post-Budget Filing at 14-15 (filed Aug. 30, 2017) (Pls.' Br.); Br. of Amicus Curiae Washington's Paramount Duty at 1, 10 (filed Aug. 30, 2017) (WPD Br.).

[5] ESHB 2239, § 6, 64th Leg., 3d Sp. Sess. (Wash. 2015); SB 6130, § 306, 64th Leg., 2d Sp. Sess. (Wash. 2015); SB 6109, § 101, 64th Leg., Reg. Sess. (Wash. 2015).

[6] SB 6104, §§ 102, 105, 64th Leg., Reg. Sess. (Wash. 2015).

(which may be funded through local levies)[7] and improving local spending accountability and transparency.[8] *See 2015 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation*, at 17-26, 31-34 (July 27, 2015) (*2015 Report*). Some elements of EHB 2242 can be traced back to the Joint Task Force on Basic Education Finance in 2009.[9] All the main elements enacted in EHB 2242 were foreshadowed in E2SSB 6195 (Laws of 2016, ch. 3, § 2), enacted in 2016.

During the 2017 session, bills containing language and provisions foreshadowing EHB 2242 were introduced and received public hearings in both houses of the Legislature.[10] The pieces of the final agreement were in full circulation in the Legislature for many, many weeks before the passage of EHB 2242. The final assembly of the pieces may have been worked out in the final days of the legislative session, but the pieces were publicly known well in advance. As was widely reported in the media, a key group of legislators met regularly and repeatedly throughout the session to work toward consensus.

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[7] ESHB 2239, § 5; SB 6130, § 401; SB 6109, § 102.

[8] ESHB 2239, § 5; SB 6130, §§ 201-209; SB 6109, §§ 101(5), 201, 105(6.

[9] *Final Report of the Joint Task Force on Basic Education Finance* (Jan. 14, 2009), http://www.k12.wa.us/QEC/pubdocs/BasicEdFinanceTaskForceFinalReport.pdf (see pages 15-16: moving away from a staff mix model; regionalization; and page 22: levy reform; local effort assistance redesign).

[10] *See, e.g.*, ESHB 1843, 65th Leg., Reg. Sess. (Wash. 2017); HB 2185, 65th Leg., Reg. Sess. (Wash. 2017); SB 5607, 65th Leg., Reg. Sess. (Wash. 2017).

Going into the 2017 legislative session, the central issue left before the Legislature was how to allocate funding for staff compensation from regular and dependable state funds rather than local levies. Contrary to Plaintiffs' argument that local levies should not be addressed in this case,[11] levy reform is intertwined with staff compensation because school districts have responded to insufficient state funding for salaries as justification for using local levies to augment salaries.[12] Levy reform may not be constitutionally required but it is certainly permissible, within the Legislature's policymaking function, and entirely reasonable. And, as was made abundantly clear in the course of this litigation, the resort to local excess levies masked the State's under-funding for years. *See McCleary*, 173 Wn.2d at 536-37.[13] Rather than being contrary to the Court's

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[11] Pls.' Br. at 18-20.

[12] *See McCleary*, 173 Wn.2d at 536-37; *see also Follow-up on Salary Spending by School Districts: Regional Differences in Additional Salary* (July 13, 2006), https://app.leg.wa.gov/CMD/Handler.ashx?MethodName=getdocumentcontent&documentId=iK0g9JICQ7A&att=false (prepared by nonpartisan House and Senate staff for the Education Funding Task Force, showing estimated additional salary paid from local levies for certified instructional staff, classified administrative staff, and classified staff in the 2014-15 school year). Similar numbers were cited by the former Superintendent of Public Instruction in a complaint filed against several school districts in July 2016. *See* http://k12.wa.us/Communications/PressReleases2016/ComplaintAsFiled.pdf.

[13] To help ensure against that situation arising in the future, the Legislature added new accountability and transparency measures to track sources of funding and amounts of expenditures for use by school districts, the State, and the public. *2017 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation* (July 31, 2017) (*2017 Report*) at 62-64.

constitutional holding, the Legislature's policy decision to reform school levies is intended to promote the State's constitutional duty.

D. The Court Should Review the Allegations of Noncompliance as a Facial Challenge to ESHB 2242 Under the Standard the Court Set Out in 2012

As it would when any other newly enacted statute is challenged immediately upon enactment, the Court should review EHB 2242 as a facial challenge. *See* State of Washington's Memorandum Transmitting the Legislature's 2017 Post-Budget Report at 27-29 (July 31, 2017) (State's Br.). Instead of looking to press releases and media reports, as Plaintiffs and Amici do, the Court should look to the language of EHB 2242 and the operating budget that implements it, and to the separate spending projections prepared by nonpartisan legislative staff and by the Office of the Superintendent of Public Instruction, as discussed below. Unless some error is demonstrated in those projections (and none has been alleged, much less demonstrated, by Plaintiffs or Amici), those projections should be accepted as accurate. Any alleged failure of the State to meet those projections in the coming school years must be demonstrated in an applied challenge, and would rest on evidence that does not yet exist.

The Constitution does not require legislative perfection, even in the context of education funding. The standard for constitutional compliance with article IX, section 1 is that the legislation must be "reasonably likely"

to provide fully sufficient state funding for the State's program of basic education. *McCleary*, 173 Wn.2d at 519. Consequently, even if the formulas in EHB 2242 are imperfect (as Plaintiffs yearly claim them to be), potentially leading to some shortfalls in revenue or funding in the future, the formulas are not "etched in constitutional stone." *Id.* at 484. As this Court stated, "The legislature has an obligation to review the basic education program as the needs of students and the demands of society evolve." *Id.*

The Legislature shares the Court's expectation that the basic education program must be systematically reviewed and revised to ensure that it meets the needs of students and complies with its constitutional obligations. EHB 2242 includes provisions requiring regular review and updating to ensure that the model continues to meet the educational needs of students and amply funds basic education. *See, e.g.*, EHB 2242, § 104 (requiring regular periodic review and update of salary allocations), §§ 407, 408 (requiring the Office of the Superintendent of Public Instruction (OSPI) to conduct a review, make recommendations to the Legislature, and update its rules regarding special education funding).

The Legislature also recognizes its duty to respond to shortfalls in funding for enacted legislation. It fulfills that duty in each odd year by enacting a new biennial budget that provides for maintenance level

spending, and in each even year by enacting a supplemental budget that adjusts spending and revenue to assure funding for its enacted programs.[14]

E. The Prototypical School Funding Model Is a Comprehensive Allocation Model That Must Be Assessed in Its Entirety

Plaintiffs and Amici attempt to disassemble the funding model into discrete pieces and then argue that each piece is inadequately funded. In doing so they fundamentally misunderstand and mischaracterize the prototypical school model. As the Court recognized, the model is an evidence-based allocation model, with its genesis in the Picus and Odden report,[15] on which the Basic Education Finance Task Force relied in making its recommendations to the Legislature.[16] *McCleary*, 173 Wn.2d at 542. Those recommendations provided the framework for the funding model enacted in ESHB 2261. *Id.*

The components of the funding model are set out to provide public transparency—they are not isolated, discretely funded components of basic education, and no single component is intended to stand alone. Because the

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[14] *See A Citizen's Guide to the Washington State Budget* at 15-16 (2016), http://leg.wa.gov/Senate/Committees/WM/Documents/Publications/2016/2016%20CGTB_Final_website.pdf. The budget process also is summarized in the Office of Financial Management's *A Guide to the Washington State Budget Process* (May 2016), http://www.ofm.wa.gov/reports/budgetprocess.pdf, and in the *2014 Report* at pages 34-38.

[15] Allan Odden et al., *An Evidenced-Based Approach to School Finance Adequacy in Washington* (Sept. 11, 2006), http://www.k12.wa.us/QEC/pubdocs/EvidenceBasedReportFinal9-11-06_000.pdf.

[16] *Final Report of the Joint Task Force on Basic Education Finance* (Jan. 14, 2009), http://www.k12.wa.us/QEC/pubdocs/BasicEdFinanceTaskForceFinalReport.pdf.

model is an allocation model, not a prescriptive model, school districts have discretion in how they spend the state allocation. The model has been specifically designed to calculate the amount of state funding necessary to amply provide for the State's program of basic education, while substantially preserving the ability of local school boards to decide how best to spend the state funding allocation to meet the needs of their students.

For example, the prototypical school model includes an allocation for the actual cost of materials, supplies, and operating costs (MSOC) on a per-student basis. *See* EHB 2242, § 402(8). But that allocation for MSOC does not limit or mandate the amount of money a school district must spend on MSOC—that decision is left to individual school districts, which may choose different priorities for spending state funds.[17] Plaintiffs and Amici appear not to understand this built-in deference to local discretion.

F. The State's Funding of Staff Compensation Significantly Increases Funding Beyond Line Items Listed in Budget Documents

Perhaps because of their misguided attempt to break the funding model into discrete "components," Plaintiffs and Amici also fail utterly to

[17] This error, among others, is reflected in the PowerPoint slide cited in Plaintiffs' Brief at 25 n.79. The cited slide treats the MSOC allocation as if it were the only state funding source that could be used for these expenditures. Moreover, the slide itself is of questionable usefulness to Plaintiffs because it fails to specify the amount of the technology grants that were received, lists expenditures for utilities and insurance that are double the amounts listed in the comments, includes professional development as MSOC, and fails to identify the portions of each item that are not part of basic education.

comprehend the significance of the State's funding of all staffing compensation costs for basic education. The increase in State funding for staff compensation—more than $5.3 billion, including benefits, over the next two biennia[18]—drives increased funding into nearly every part of the prototypical model, and to special education, bilingual education, the learning assistance program, and the highly capable program.[19] Because funding levels for these programs are based on instructional time, and the State uses the salary schedules in the prototypical school funding model to allocate funding for these specialized forms of instruction,[20] the increases in state funding for these programs that flow from state funding for compensation are significant—and completely discounted or overlooked by Plaintiffs and Amici.

For example, funding for the learning assistance program provides additional hours of instruction for students not meeting academic standards. The State allocates funding for those additional hours of instruction by funding additional certificated instructional staff. By increasing the state salary allocation for each state-funded certificated instructional staff person, the State increases the allocation for the learning assistance program

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[18] *2017 Report* at 12-14, 27.

[19] *Id.* at 28. Increased state funding for compensation also drives additional allocations for pupil transportation. *Id.*

[20] *Id.*

because it allocates funding for each staff person at a higher rate. Inn the 2016-17 school year the state allocated $54,890 for each state-funded certificated instructional staff.[21] With enactment of EHB 2242 and the 2017-19 operating budget, state allocations for certificated instructional staff are increased to $72,694,[22] a 32 percent increase that proportionally increases allocations to each of the State's basic education programs.

G. EHB 2242 Increases Total Funding For K-12 Education in Every School District in the State

Plaintiffs and Amicus Washington's Paramount Duty appear to believe—erroneously—that EHB 2242 reduces funding for education compared with prior law. They both cite a statement by Tacoma Public Schools as support.[23] That statement is wrong, for at least three reasons:

- The statement uses incorrect numbers for "old state funding." It should start with maintenance level funding for 2018-19, which

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[21] OSPI, *Preliminary School District Personnel Summary Reports 2016-17 School Year* (Feb. 2017), http://www.k12.wa.us/safs/PUB/PER/1617/All.pdf. See Table 34B, *Certificated Instructional Staff in All Programs*, available separately at http://www.k12.wa.us/safs/PUB/PER/1617/ps.asp (last visited Sept. 8, 2017). For the Court's convenience, a printout of that table is attached as Appendix A to this brief with the pertinent value circled (in the last row of the table).

[22] *2017 Report* at 22.

[23] Pls.' Br. at 11 n.41; WPD Br. at 10. By pointing out the errors in the statement, the State does not intend to levy criticism at Tacoma Public Schools. EHB 2242 is complex legislation that comprehensively revises the state funding model. It is to be expected that early estimates of its effects will contain errors. The State is disappointed, however, that Plaintiffs and Amici would make arguments to the Court based on a press release rather than confirming the real numbers using verifiable tools that are available through the Office of the Superintendent of Public Instruction.

is $261,809,786 (rather that $270,243,253) and use that number when applying inflation for subsequent years.[24]

- The statement uses incorrect numbers for its levy amount. Its existing levy authority is $86 million, not $96 million.[25] In addition, the statement assumes the school district will be able to levy to the full extent of its authority—i.e., $90 million, according to the assumptions listed below the table—with no reduction or levy failure. That is possible, but it is speculative.
- Applying the law as it existed before EHB 2242, the permissible levy amount would fall in 2019 by at least 4 percentage points. RCW 84.52.0531, which the statement does not acknowledge.[26] For simplicity, we have not included that additional reduction in our calculation.

When the correct numbers are used, applying the same assumptions as the statement did[27]—even without including the additional drop off in local levy funding under the pre-EHB 2242 law—the actual funding per

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[24] The correct number can be found by using OSPI's Multi-Year Budget Comparison Tool, http://www.k12.wa.us/SAFS/17budprp.asp. Open the tool, click on the third tab ("summary"), select "Tacoma School District" and "School Year 2018-19 at the indicated locations at the top of the spreadsheet, and then select "No" in response to "Use Caseload Forecasted Enrollment" (to match Tacoma's assumption of no enrollment growth). The correct value for state funding under the law before EHB 2242 is in the intersection of the row titled "Total State Funding" and the column titled "Maintenance." For the Court's convenience, a printout of that table is attached as Appendix D to this brief with the correct value circled.

[25] OSPI, *Analysis of Excess General Fund Levies Collectible in 2016*, at 32 (Dec. 5, 2016), http://www.k12.wa.us/safs/PUB/LEV/1617/1061r.pdf (see column "Certified Levy Amount"). For the Court's convenience, a printout of this page is attached as Appendix E with the correct value circled. The $86 million figure aligns with the $90 million estimate for subsequent years that Tacoma Public Schools lists in its assumptions.

[26] RCW 84.52.0531 was amended in the 2017 regular session to extend the higher levy rate by one year, to 2018, to accommodate the transition to full state funding of basic education. ESB 5023 (Laws of 2017, ch. 6, §§ 1, 2). Thereafter the rate drops by 4 percent and the levy base also is reduced, lowering the levy amount still further. *Id.* This was the law in effect prior to EHB 2242.

[27] Three percent inflation, no enrollment growth (28,543 students each year), local levy or local effort levy at $90 million per year.

student FTE *increases* by $635 in 2018-19 and $793 in 20-21.[28] In other words, Tacoma Public Schools overstates the funding it would receive prior to EHB 2242. When the correct numbers are used, Tacoma Public Schools will receive *$947 more per student* in 2020-21 than its statement reports. Tacoma Public Schools receives substantially more state funding and total funding under EHB 2242 than under prior law.[29]

Indeed, every school district in the State is projected to receive more state funding under EHB 2242 than under prior law; almost every district

[28] Here is the corrected version of the table Tacoma Public Schools produced:

Old State Funding Formula:	2018-19 (no levy cliff)	2019-20 (no levy cliff)	2020-21 (no levy cliff)
State	$ 261,809,786	$ 265,115,728	$ 269,676,762
Levy or Local Effort Levy	$ 86,000,000	$ 90,000,000	$ 90,000,000
Total	$ 347,809,786	$ 355,115,728	$ 359,676,762
Per Pupil	$ 12,185	$ 12,441	$ 12,601
New State Funding Formula:	2018-19	2019-20	2020-21
State	$ 306,168,978	$ 337,604,868	$ 342,812,281
Levy or Local Effort Levy	$ 59,760,663	$ 37,301,757	$ 39,489,748
Total	$ 365,929,641	$ 374,906,625	$ 382,302,029
Per Pupil	$ 12,820	$ 13,135	$ 13,394
Increase Per Pupil Under EHB 2242:	$ 635	$ 693	$ 793

[29] Amicus Washington's Paramount Duty also cites public statements from Seattle Public Schools. WPD Br. at 11. Those statements do not contain any information about what assumptions are made. They may or may not contain errors similar to those in Tacoma Public Schools' statement, but should not be accepted as fact.

also receives more total funding.[30] This includes the Chimacum School District, which the McCleary children attended. Amicus Washington Paramount Duty contends Chimacum School District will lose a million dollars in 2019 under EHB 2242, compared with prior law.[31] That contention demonstrates the risk of relying on a television interview rather than actual numbers. Using OSPI's Multi-Year Budget Comparison Tool, Chimacum School District actually is projected to receive nearly *two million dollars more* in school year 2018-19 under EHB 2242 than it would have received under prior law, and that number rises to more than three million dollars in both 2019-20 and 2020-21.[32]

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[30] This statement can be verified by using OSPI's Multi-Year Budget Comparison Tool, http://www.k12.wa.us/SAFS/17budprp.asp, for each of the 295 school districts in the State. Admittedly, this is a somewhat tedious exercise. However, less detailed summary reports produced by nonpartisan staff in both the Senate and the House of Representatives confirm that most school districts receive substantially more state funding under EHB 2242 than they would have received under prior law; a few very small districts that already receive large state allocations (often exceeding $30,000 per student) due to the small school district enhancement in the funding model, receive smaller increases (or are held harmless to avoid any reduction) in state funding. *See* http://leap.leg.wa.gov/leap/Budget/Detail/2017/hoK12TaxPolicyAnalysis_0629.pdf (House); http://leap.leg.wa.gov/leap/Budget/Detail/2017/soK12TotalFunding_0629.pdf (Senate). For the Court's convenience, printouts of these two reports are attached as Appendices F and G, respectively, with the relevant column headings circled.

[31] WPD Br. at 19-20.

[32] For the Court's convenience, printouts of the relevant tables are attached as Appendices H, I, and J with the pertinent value circled on each table. For school year 2018-19, OSPI estimated the increase in funding under EHB 2242 to be $1,964,823. App. H. For school year 2019-20, the estimated increase is $3,167,408. App. I. For school year 2020-21, the estimated increase is $3,321,413. App. J. OSPI did not capture all revenue to school districts because it is not yet clear which districts will receive revenue from various grants.

H. The 2017-19 Operating Budget Funds All Increases in Spending for the State's Program of Basic Education Enacted Since the 2012 *McCleary* Decision and Carries Forward All Spending Increases Enacted in EHB 2242 as Maintenance Level Funding

Plaintiffs seemingly have failed to learn the meaning of "maintenance level" funding, even though it was explained at length in the *2014 Report* at pages 35-36, and again in the State's brief filed on June 17, 2016.[33] Consequently, they seek to discount budgetary increases in state funding for legislation enacted in prior legislative sessions as "treading water"—i.e., maintaining the status quo. Pls.' Br. at 12. Maintenance level funding is not just the cost of maintaining the "status quo." It is the estimated cost of paying for everything *already enacted into law*—including the cost of programs or enhancements that first take effect in the current biennium even though they were enacted previously, and including additional estimated costs to be incurred due to inflation and increased caseloads and enrollment.[34]

One pertinent example is the cost for completing the K-3 class size reductions enacted in SHB 2776 (Laws of 2010, ch. 236, § 2). The 2015-17 operating budget funded the second increment and the 2017-19 operating

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[33] State of Washington's Reply Brief and Answer to Amicus Briefs Filed by Arc of Washington et al., Columbia Legal Services et al., Washington's Paramount Duty, and the Superintendent of Public Instruction at 15-17 (June 17, 2016).

[34] *Id.*

budget funded the final increment (for the 2017-18 school year).[35] This funding is not "treading water"—it is paying for real changes in the program of basic education that were enacted previously but take effect in this biennium.

I. EHB 2242 Funds Market Rate Salaries for Educational Staff Engaged in the State's Program of Basic Education

Plaintiffs complain that the State has insufficient data to support its compensation numbers and argue that the State has not taken into consideration what the districts are actually paying, as found in collective bargaining agreements. Pls.' Br. at 37 n.118. Paradoxically, they also appear to claim that it doesn't matter, because even if the evidence is sound, legislators could not have taken any of it into consideration because their vote was rushed on June 30, 2017. Pls.' Br. at 35, 36, 37.[36]

In its opening brief, the State explained that two separate consultants reviewed data and confirmed that what districts were actually paying was an accurate market rate. State's Br. at 17-19. Although Plaintiffs apparently are unhappy with the results obtained by both consultants, they do not rebut the data or conclusions drawn by Dr. Taylor in her consulting work

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[35] *2017 Report* at 43-44; *see* ESSB 6052, § 202(2) (Laws of 2015, 3d Sp. Sess., ch. 4); SSB 5883, § 502(2) (Laws of 2017, 3d Sp. Sess., ch. 1).

[36] This statement is unfounded. The State previously explained the multi-year genesis of the policies enacted in EHB 2242. *See* Argument Section C *supra* p.5.

supporting the Compensation Technical Working Group in 2012 or those produced by the Education Funding Task Force consultant in 2016.[37] Contrary to Plaintiffs' claims, the State has captured what districts already have been paying to derive an estimate of market rate. According to the 2016 data compiled by the consultant, districts paid an average salary across all staff of $60,915, including supplemental pay. Comparison with preliminary data reported by districts to OSPI for school year 2016-17 yields a higher number of $62,131.[38] Thus, *the State's allocation will be higher than both numbers* upon full implementation of the total compensation increases in the 2019-20 school year. The statewide average

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[37] Pls.' Br. at 36 (refusing to identify Dr. Taylor by name or title, instead referring to her only as "a person" who submitted something to the work group).

[38] Districts submit personnel reports to OSPI that capture base salary and additional salary for average total salaries by employee type. OSPI reports those numbers publicly. The most recent report is the preliminary report from the 2016-17 school year. OSPI, *Preliminary School District Personnel Summary Reports 2016-17 School Year* (Feb. 2017), http://www.k12.wa.us/safs/PUB/PER/1617/All.pdf. The current (2016-17) average across all three staff types can be derived from this OSPI Report but requires doing some mathematics, beginning with data from three tables in that report. For the Court's convenience, printouts of these tables are attached to this brief as Appendices A, B, and C, with the pertinent values circled.

Table 34B shows Certificated Instructional Staff (CIS). The summary for CIS lists an average total salary of $68,047 with 68,298 FTE (last row of the table). *See* App. A.

Table 36B shows Certificated Administrative Staff (CAS). The summary for CAS shows an average total salary of $118,674 with 4,794 FTE (last row of the table). *See* App. B.

Table 38B shows Classified Staff. The summary for Classified shows average total salary of $45,422 with 41,339 FTE (last row of the table). *See* App. C.

Average total salary can be derived from the following formula: (CIS FTEs 68,047 x CIS avg salary $68,298) + (CAS FTEs 4,794 x CAS avg salary $118,674) + (CLS FTEs 41,339 x CLS avg salary $45,422) = $7,094,097,220. Dividing that amount by the sum of all staff FTEs of 114,180 yields average total salary for 2016-17 of $62,131.

salary allocation for all staff is projected to be $69,721 in the 2019-20 school year. *2017 Report* at 22 n.40 (cited in State's Br. at 19). Thus, the State has taken actual costs into consideration and funded an average salary that is several thousand dollars higher than staff currently receive. And this number includes just salaries; on top of this amount, the State also will be funding benefits, pensions, and other related costs. *See 2017 Report* at 27. Finally, after achieving market rate salary allocations, the State puts measures into law to build in cost of living increases and to ensure that it periodically reviews and rebases salary allocations. *2017 Report* at 25-26.[39]

1. All Other Challenges Regarding Compensation Are Disagreements with Policy Decisions, Not Constitutional Arguments

Plaintiffs next suggest that school districts will not be able to pay high quality employees, even though no district will receive any less money for its employees under EHB 2242.[40] Their argument is really a collateral attack on the Legislature's policy decision to revamp levy authority and ensure basic education expenditures are not paid from local excess levies, consistent with reforming constitutional infirmities.

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[39] Plaintiffs contend EHB 2242 sets a maximum salary of $90,000. Pls.' Br. at 37. They are wrong. *2017 Report* at 22.

[40] Pls.' Br. at 34-38.

In response to Plaintiffs' successful argument at trial that over-reliance on local excess levies was a primary factor establishing state liability in this case, the only responsive principle of constitutional magnitude is that the State must provide enough state resources to ensure districts can deliver the basic education program defined by the Legislature. All other issues Plaintiffs raise concerning local excess levy policy are for the Legislature to determine, and arguments for or against any policy should be addressed in the legislative process.

As noted above, over-reliance on excess levies masked State underfunding for years so it is entirely reasonable and unsurprising that the Legislature would attempt to lessen the risk of falling into noncompliance again. Levy reform, increased accountability measures, and built-in review of various aspects of the funding model all contribute to that attempt. They also provide timely information about how well the funding model is meeting the needs of school districts and school children. It is curious that Plaintiffs and Amici would oppose such measures.

2. The State Has Taken Meaningful Steps To Enhance Teacher Recruitment

Plaintiffs reference a projected teacher shortage in an oblique attack on compensation levels. As the Legislature has reported to the Court, in recent years it has enacted measures to address and enhance teacher

recruitment. In 2015 it increased support for the Beginning Educator Support Team (BEST) grant program to support new teachers. *2015 Report* at 12. In 2016, it enacted E2SSB 6455 (Laws of 2016, ch. 233), implementing several strategies intended to address teacher recruitment, including financial aid programs; increasing teacher mentoring support; easing the path for advanced level, out-of-state teachers to be issued a professional certificate; making it easier for retired teachers to work as substitutes; expanding alternative routes to teacher certification; enhancing information dissemination and data collection from school districts about hiring; and establishing the TEACH pilot grant project. *2016 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation* at 24 (May 18, 2016) (*2016 Report*); E2SSB 6455.[41] In 2017, the Legislature created a new Paraeducator Board to establish statewide standards, training, and career development for paraeducators who provide instruction in programs designed to reduce the opportunity gap that places some groups of children at a relative educational disadvantage. ESHB 1115, § 1 (Laws of 2017, ch. 237).

[41] Appropriations for these efforts and others can be found in the 2017-19 operating budget. SSB 5883, §§ 501(4)(b), 513(12).

More significantly, in 2017 the Legislature increased minimum mandatory salaries for beginning teachers going forward,[42] and created school district compensation incentives for hard-to-staff positions such as science, technology, math, engineering, transitional bilingual and special education. *2017 Report* at 23 n.44; EHB 2242, § 103(2)(c)(v).

It is too soon to evaluate the cumulative impact of all these measures. But the Legislature has acted. There is nothing on the face of the legislation to suggest that the measures will not have the intended positive effect. The Court should not presume that these measures will fail.

3. EHB 2242 Funds Additional Staff But Leaves the Staffing Mix to Local Decision-Makers

To the extent Plaintiffs or Amici are dissatisfied with the staffing levels established in the State's funding model, their dissatisfaction does not raise a constitutional issue. This Court's 2012 decision did not declare any constitutional infirmity with the staffing levels set forth in SHB 2776. Instead, the Court turned to the evidence in the trial, stating that it "highlighted three major areas of underfunding: basic operational costs [now called MSOC]; student to/from transportation; and staff salaries or benefits." *McCleary*, 173 Wn.2d at 533. The Legislature fully funded

[42] *2017 Report* at 21-22.

student transportation in fiscal year 2014-15[43] and MSOC the next year,[44] and it enacted legislation in 2017 that fully funds staff salaries and benefits by the 2019-20 school year.[45]

The State is not arguing that overall staffing levels should remain fixed—indeed, EHB 2242 provides funding for additional staff beyond that provided for K-3 class size reduction. *2017 Report* at 37, 41. The State has increased staffing allocations in discrete areas. *2013 Report* at 15-16; *2014 Report* at 22-23. The State *is* arguing (1) that the Legislature has funded reduced K-3 class sizes consistent with ESHB 2261 (*2017 Report* at 43-44); (2) that the Legislature has stated its intent to address staffing ratios once it has completed its obligations under *McCleary* (Laws of 2015, 3d Sp. Sess., ch. 38, § 1 (HB 2266); Laws of 2017, 3d Sp. Sess., ch. 13, §§ 904, 905 (EHB 2242)); (3) that objective evidence as to proper staffing ratios at the higher grades has not yet been established; and (4) that the Court has not identified any specific staffing ratio as constitutionally mandated.

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[43] *2013 Report to the Washington State Supreme Court by the Joint Select Committee on Article LK Litigation* at 12-13 (Aug. 29, 2013) (*2013 Report*); *see also 2014 Report* at 11-14 (explaining application of the pupil transportation funding formula); *2014 Report* at 46-50 (explaining relationship between fiscal years and school years when funding the pupil transportation expected cost model); *2016 Report* at 17 (full funding in 2015-17 biennial budget); *2017 Report* at 39-40 (full funding in 2017-19 and 2019-21 biennial budgets)

[44] *2015 Report* at 8; ESSB 6052, § 502(8); *see 2016 Report* at 14 (full funding in 2015-17 biennial budget); EHB 2242, § 402(8) (full funding for 2017-19 biennium).

[45] *2017 Report* at 17-27; EHB 2242, §§ 101-104, 401, 501.

The argument that a school district hires more or different staff than is allocated under the prototypical funding model does not objectively demonstrate that the State funds inadequate staffing levels. The state apportionment formula is for allocation purposes, and school districts can and do make local choices about staffing that depart from the formula's assumptions. That is part of local control.

J. EHB 2242 Provides Ample Funding for Special Education

Plaintiffs and Amici cannot assert a new claim concerning the special education funding formula at this late stage of the remedial phase of *McCleary*. Even if they could, their arguments are insufficient to prove facial invalidity. And any attempt to bring an as applied challenge is premature.

1. The State provides three tiers of special education funding

The State provides special education funding on an excess cost basis. RCW 28A.150.390; SSB 5883, § 507(1). The special education excess cost funding allocation is designed to pay for the excess cost of the student's specially designed instruction and any special education services over and above the cost of the student's basic education. *Sch. Dists.' All. for Adequate Funding of Special Educ. v. State*, 149 Wn. App. 241, 249, 202

P.3d 990 (2009) (*Alliance* I), *aff'd*, 170 Wn.2d 599, 244 P.3d 1 (2010) (*Alliance* II). The State provides three tiers of special education funding.

The first tier is the basic education allocation, also referred to in the operating budget as general apportionment. School districts must ensure that special education students as a class receive their full share of the basic education general apportionment. Laws of 2017, 3d Sp. Sess., ch. 1, § 507(1)(a); *Alliance* I, 149 Wn. App. at 250. The general apportionment/ basic education allocation is derived from the prototypical school model in RCW 28A.150.260 and includes all the most recent enhancements to the prototypical model. It also provides the "base allocation" for the second tier of funding. RCW 28A.150.390(3)(a); Laws of 2017, 3d Sp. Sess., ch. 1, § 507(4)(a).

The second tier is the special education excess cost allocation. To the extent school districts cannot provide an appropriate education for special education students through the basic education general apportionment, services shall be provided using the special education excess cost allocation. Laws of 2017, 3d Sp. Sess., ch. 1, § 507(1)(a); *Alliance* I, 149 Wn. App. at 250. The excess cost allocation is derived by multiplying the base allocation by 0.9309 for each full-time equivalent student up to the new funded enrollment percentage of 13.5 percent of a district's enrollment. Laws of 2017, 3d Sp. Sess., ch. 1, § 507(5);

RCW 28A.150.390(2)(b). That amount of funding is added to the base allocation, thus nearly doubling the per-student allocation.

The third tier of funding comes from the special education Safety Net. The Safety Net is designed to provide more money to districts with legitimate special educations costs that exceed the allocations provided through the first two tiers of special education funding. RCW 28A.150.392 (enacted as part of ESHB 2261, Laws of 2009, ch. 548, § 109). To be eligible for Safety Net funds, a district must demonstrate that all legitimate expenditures for special education exceed all available revenues from state and federal funding formulas. RCW 28A.150.392. The Safety Net committee may consider extraordinary high cost needs of one or more individual special education students or extraordinary costs associated with communities that draw a larger number of families with children in need of special education services. RCW 28A.150.392.[46]

2. Plaintiffs and Amici cannot succeed in a facial challenge to the State's special education funding allocation

In the *Alliance* case, the plaintiffs (many of whom also are plaintiffs in *McCleary*) brought a claim seeking judgment that the special education

[46] The committee will award a district Safety Net funding only for direct special education and related services identified in an appropriate, properly prepared and formulated Individualized Education Program (IEP). Differences in program costs attributable to district philosophy, service delivery choice, or accounting practices are not a legitimate basis for Safety Net awards. *See* RCW 28A.150.392; *Alliance* I, 149 Wn. App. at 251; WAC 392-140-600 through -685.

funding system, including the excess cost allocation and the safety net, were unconstitutional because the system failed to provide sufficient funding, forcing the school districts to resort to local levy funds. *Alliance* I, 149 Wn. App. at 248. The plaintiffs attempted to prove underfunding by excluding the basic education allocation from their calculation of available revenues to match against expenditures. The trial court, the Court of Appeals, and this Court all ruled that the plaintiffs failed to make their case due to that fundamental flaw. *Alliance* II, 170 Wn.2d at 610-11.

Plaintiffs and Amici attempt to bring the same claims (with the same flaws), this time as a collateral attack on the State's actions to complete the remedies set forth in this Court's *McCleary* decision. To succeed on a facial challenge, Plaintiffs and Amici must prove there is no set of circumstances that would permit a conclusion that school districts receive sufficient funding to provide services to special education students. *Alliance* I, 149 Wn. App. at 263. Plaintiffs and Amici cannot meet that burden. Plainly, there are circumstances that would permit such a conclusion.

First, the State is injecting a large amount of money into education, including the $5.3 billion in increased staff compensation in the next two biennia. The new state money for compensation, smaller class sizes, and more staffing in the prototypical model increases the basic education allocation, so it has a compounding effect on the special education excess

cost allocation. The allocation for each special education student will include a much larger basic education allocation plus 93 percent of that larger number for a much larger special education excess cost allocation. Added together, it means that the total available per student will increase significantly. Plaintiffs and Amici do not even attempt to account for the increases in basic education allocation and special education allocation money over the next four years.

Second, the allocation formula recognizes that some students may cost less and some students may cost more than the combined allocation the model provides. School districts receive the full basic education allocation for each student. Districts also receive the special education excess cost allocation for each special education student up to the new percentage of 13.5. If a student's needs do not cost the full allocated amount, that money is not withheld by or returned to the State. It is available to spend on other students. In short, the pool of money may be enough to cover the costs of all services dictated by individual educational programs (IEPs) even if the school district's actual population exceeds 13.5 percent. It depends on the individual IEPs and services provided.[47] If the services cost more, the Safety

[47] Amici also argue that the State should allocate additional staff for special education services. But districts are free to use the basic education allocation and special education allocation to staff as individual students' needs dictate. After all, special education funding is intended to serve students with Individualized Education Programs

Net process is available. In sum, there are clearly circumstances under which the statutes providing for basic education and special education can operate constitutionally. For similar reasons, there is no basis whatsoever to conclude, as Amici Arc of King County et al. do, that the State's funding statutes facially deny services to any children.[48]

Finally, on its face EHB 2242 contains a remedial process for reviewing the Safety Net, assigning that review to OSPI. *See 2017 Report* at 30; State's Br. at 21; EHB 2242, § 408. To the extent there is evidence that the Safety Net requires adjustment, Plaintiffs and Amici would have the Court declare this process a failure before it begins.

3. Plaintiffs and Amici cannot succeed in a premature applied challenge to the State's special education funding allocation

To bring an as applied challenge to the funding statutes, the challenging party must demonstrate with evidence that all available revenues, including the basic education allocation, and the special education excess cost allocation to a district does not provide enough state money to pay for the services pursuant to properly prepared IEPs. Further, they must

(IEPs)—i.e., to tailor service to individual students based on their needs. A one-size-fits-all state-mandated staffing requirement would not promote individualized services.

[48] Amicus Curiae Memorandum of the Arc of King County et al. at 9 (filed Aug. 30, 2017) (Arc Br.).

show that the district has exhausted the Safety Net process and there is remaining unmet need. *Alliance* I, 149 Wn. App. at 248, 265.

In attempting to muster an as applied challenge, Plaintiffs and Amici reply primarily on newspaper articles reporting on unexamined allegations that there will be shortfalls in certain school districts. None of the articles or press releases purport to examine how the alleged shortfalls were determined. They do not discuss whether the state's increased salary allocations under EHB 2242 will replace special education salary costs that may formerly have been borne by levies. They do not specify whether the basic education allocation, including new funding and its effect on the excess cost allocation, is fully and properly accounted for. Even if these news reports were evidence, Amici's claim that none of the basic education allocation is available for special education services, Arc Br. at 11, already has been rejected by this Court in *Alliance* II, 170 Wn.2d. at 610.

Arc of King County et al. next cite a statement from an 2016 OSPI amicus brief stating that expenditures listed on school districts' F-196 Reports in 2014-15 showed school districts expended $266 million more than they received from the State for special education. Arc of King County et al. then claim that the State is increasing spending for special education by only $22.6 million, and conclude there must be a huge shortfall. Arc Br. at 13. The Court should reject both parts of this argument. The F-196

Reports were the subject of extensive argument in the *Alliance* case, with the court concluding that they were not competent evidence to prove underfunding. *Alliance* I, 149 Wn. App. at 257 (substantial evidence supports the trial court's finding that the F-196 Reports do not demonstrate underfunding).

In the second part of their argument, Arc of King County et al. draw an erroneous conclusion from the *2017 Report*, from which they significantly understate state spending increases. The $22.6 million figure is an amount attributable solely to raising the special excess cost allocation percentage from 12.7 percent to 13.5 percent. *2017 Report* at 13. Instead, as explained above, and in State's Brief at page 20, there will be a much larger increase in special education spending due to the changes in the prototypical model. Even comparing the difference between appropriations for the special education excess cost in the biennial operating budgets shows an increase of $266 million from 2015-17 to 2017-19 *before* factoring in the new compensation increases.[49] Amici's premature attempt at an applied

[49] The 2017-19 operating budget appropriates $2,000,069,000, excluding the federal appropriation, for special education excess cost. Laws of 2017, 3d Sp. Sess., ch. 1, § 507. That compares to $1,733,950,000 appropriated in the 2015-17 operating budget (again excluding the federal appropriation) for an increase of $266,110,000. Laws of 2015, 3d Sp. Sess., ch. 4, § 507. The special education appropriations do not include policy level compensation increases in either biennial budget. Instead, appropriations for compensation are made in section 503.

challenge fails for lack of *any* evidence that the new funding resulting from 2017 legislation will result in a state funding shortfall.

K. Plaintiffs and Amici Cannot Create Their Own Constitutional Mandates

1. Plaintiffs and Amici Cannot Claim Constitutional Noncompliance Based on Their Preferred Program of Basic Education

Plaintiffs and Amici also continue to argue for constitutional noncompliance based on *their* measures of what should be done—not on measures established by this Court or the Legislature. The Washington Constitution does not confer on Plaintiffs or Amici the authority to determine either the State's program of basic education or the measure of ample funding under article IX, section 1. It is for the *Legislature* to determine what constitutes the program of basic education and what constitutes "ample provision" for the State's program of basic education. *McCleary*, 173 Wn.2d at 517-20. And it is for the *Court* to determine whether the Legislature's provision is constitutionally sufficient. The Court's determination here rests on its assessment of EHB 2242.

2. Recommendations of Advocates and Workgroups Are Not Constitutional Mandates

Plaintiffs and Amici National Association for the Advancement of Colored People et. al., attack the Learning Assistance Program and Transitional Bilingual Instruction Program on two bases. First, they argue

that new targeted enhancements and resources to each program are invalid precisely because they are targeted to the most needy within those populations. Pls.' Br. at 31-32; Amici Br. at 12-14. But under that logic these programs could not exist. The argument proves too much and works against the very interests the Plaintiffs and Amici are trying to protect.

Second, the Amici argue that allocations for the programs are different from what various workgroups have recommended. Amici Br. at 9-11, 14-15. But there is no legal or constitutional requirement that the Legislature and Governor adopt any recommendation of any education advocacy group or legislative workgroup.[50] It is the Legislature that has the constitutional duty to provide the specific details of the constitutionally required education. *McCleary*, 173 Wn.2d at 517. It is the Legislature that determines whether and to what degree the reports it commissions will be implemented in legislation. A report is not law, and the recommendations of a report are not constitutional mandates.[51]

It also is inaccurate to say that the Legislature has disregarded reports and studies. *See* Pls.' Br at 36-37. There is an important distinction

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[50] *See* Amicus Brief of National Association for the Advancement of Colored People et al. at 8-16 (filed Aug. 30, 2017) (citing commendations).

[51] The Court acknowledged that the State is not constitutionally bound to adopt recommendations by various workgroups, because they do not provide the only means of achieving compliance. Order at 7, *McCleary v. State*, No. 84362-7 (Wash. Aug. 13, 2015).

between the presentation of objective data in a report or study, and the recommendations proposed by the authors of a report or study. Recommendations often reflect an agenda that is too narrowly focused or skewed in perspective to be useful to the Legislature—which has duties extending far beyond those of a particular workgroup.[52]

The State does not in any way discount the value of information received from advocates for education. It is appropriate for those advocates to propose new ideas and new programs—and, of course, new legislation. Indeed, our constitution designates a statewide elected official to be such an advocate. But no such proposal—even an excellent one advocated in the course of litigation—automatically becomes an element of the State's program of basic education or establishes a constitutional requirement under article IX, section 1. Amendments to law should be accomplished by lobbying the Legislature, not the Court.

L. Capital Funding

The state allocation model and the budget, consistent with ESHB 2261 and SHSB 2776, includes resources sufficient to staff a teacher for

[52] The Legislature is not bound by workgroup recommendations, but it would be incorrect to claim that it ignores such recommendations. As the Court noted, the revised prototypical school funding model enacted in ESHB 2261 was based on a recommendation by the Basic Education Finance Task Force, which in turn was based in large part on the Picus and Odden Study. *McCleary*, 173 Wn.2d at 504, 506. ESHB 2261 created the Quality Education Commission, whose initial report provided a basis for many of the provisions enacted in SHB 2776. *Id.* at 509.

every 17 students in grades K-3. As explained above, the formula is an allocation model that leaves actual staffing decisions to local districts. Plaintiffs maintain that funding for school construction must be included in the allocation model. Pls.' Br. at 26 n.81. Their argument rests on their policy aspirations, not on the Constitution. In 2016, the State provided an overview of the shared responsibility model for capital facilities contemplated in article VII, section 2(b), article VIII, sections 1(e) and 6, and article IX, section 3 of the Washington Constitution. State's Br. Responding to Order Dated July 14, 2016, at 19-21 (Aug. 22, 2016). Plaintiffs have not refuted or even responded to that constitutional analysis.

Funding for school facilities is ongoing through the capital budget and the School Construction Assistance Program. RCW 28A.525. That program is an allocation model separately authorized and distinct from the prototypical school funding model, and it also affords school districts substantial local decision-making in how to use the funds.

M. No Individual Revenue Source Needs to Be Guaranteed in Perpetuity for State Funding to Be Regular and Dependable

The Court need not address the argument of Amici Washington State Budget & Policy Center et al. (WBPC) that the state property tax enacted in EHB 2242 is not regular and dependable because it reestablishes an existing statutory limit on annual property tax revenue in 2022. The

Court does not resolve issues raised only by amici. *City of Seattle v. Evans*, 184 Wn.2d 856, 861 n.5, 366 P.3d 906 (2015) (citing *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003)), *cert. denied sub nom. Evans v. City of Seattle*, __ U.S. __, 137 S. Ct. 474, 196 L. Ed. 2d 384 (2016).

But even if the Court were to address that issue, WBPC's argument should be rejected because it rests on three false premises.

First, WBPC implicitly assumes the state property tax is the sole—or at least primary—revenue source for K-12 schools. It is neither. It is just one among many revenue streams that are placed in the State's general fund, from which most K-12 school funding is drawn.

Second, WBPC explicitly assumes that the State is constitutionally obligated to "set aside" sufficient regular and dependable funding sources for basic education. WBPC Br. at 13-14. No such "set aside" provision is found in article IX, section 1, or in a decision of this Court. Rather, the State is obligated to provide "fully sufficient" "state-provided funding" for the State's program of basic education. *McCleary*, 173 Wn.2d at 527-28.

Third, WBPC assumes the Legislature will take no action in response if state revenue becomes insufficient to support the service levels enacted in EHB 2242. As explained above, the Legislature routinely provides additional funding in supplemental budgets where necessary to

support legislative enactments, and it adopts a new budget every biennium in which it adjusts revenues as necessary to support spending. The Court should assume the Legislature will do its job, not that it will allow public school funding to fall to inadequacy through inaction. *Grant v. Spellman*, 99 Wn.2d 815, 818-19, 664 P.2d 1227 (1983) (Court presumes Legislature will act with integrity and with a purpose to keep within constitutional limits).

N. The Court Should Dissolve the Order of Contempt, Relinquish Jurisdiction, and Dismiss This Appeal

1. The Legislature Enacted Legislation Before the 2018 Deadline That Fully Implements and Funds the State's Program of Basic Education

In 2016, the Court specifically asked what remained to be done to achieve compliance. Order at 2, *McCleary v. State*, No. 84362-7 (Wash. July 14, 2016). The State listed three tasks: finish funding for K-3 class-size reductions; increase state funding to account for inflation, student enrollment, and other variables; and determine the cost and enact legislation to fully fund salaries needed for school districts to recruit and retain staff to implement the State's statutory program of basic education.[53] EHB 2242 does all three.

[53] State of Washington's Brief Responding to Order Dated July 1, 2016, at 2-3 (Aug. 22, 2016).

To help fund the expanded state obligations, EHB 2242 enacted a state property tax to replace school districts' dependence on local levies to fully fund basic education. To implement the transition to state funding, the Legislature had to address the overlap in school years (September through August), calendar years (January through December), and state fiscal years (July through June). Calendar year 2018 thus is a transition year, in which the new state sales tax comes into effect, allowing part but not all of the increase in state funding enacted in EHB 2242 to be implemented in the 2018-19 school year. By the 2019-20 school year, the transition is complete. The table in Appendix A of the *2017 Report* summarizes the carefully sequenced steps enacted to implement this transition to full state funding for basic education by the 2019-20 school year.

What is significant is that this entire sequence is now enacted into law with the enactment of EHB 2242. No further legislative action is necessary for these steps to occur, other than the adoption of a new biennial budget in 2019.

In its July 2016 Order, the Court included a footnote stating that the Legislature is not constitutionally prohibited from requiring itself to make future appropriations to implement legislation. Order at 2 n.1, *McCleary v. State*, No. 84362-7 (July 14, 2016). That is precisely what the 2017 Legislature did in enacting EHB 2242—it required itself to appropriate

funds necessary to finish implementing EHB 2242 in the 2019-21 budget. But as the Court also noted in that same footnote, the Legislature may not constitutionally make appropriations beyond the current biennium. *Id.* (citing Const. art. VIII, § 4). Plaintiffs and Amici treat this well-settled constitutional principle as an ad hoc excuse by the State for failing to do something that it clearly cannot.

EHB 2242 completes the implementation of the educational reforms endorsed by this Court in 2012 and provides for the necessary funding. Under our Constitution, that funding must be provided on a biennial basis.

2. The Court Should Dissolve the Order of Contempt

The Legislature did not "defy" the Court, as Plaintiffs assert.[54] The Legislature responded to the Court's decision and orders, including the order finding the State in contempt, by fully funding the prototypical school model, revising the model to provide state-funded market rate salaries to all basic education staff, and eliminating the need for supplemental basic education funding through local levies to pay for basic education. In doing so, the Legislature has doubled state funding for basic education since 2012.

It is true that the Legislature did not establish a separate account into which the Court-ordered sanction would be placed. But under the Court's

[54] Pls.' Br. at 22.

order, the accumulated sanction in that account would have been allocated for the support of basic education.[55] Even had it been placed in a separate account, it would have been subsumed within the nearly $3.8 billion increase in K-12 funding in the 2017-19 biennium over the prior biennium. Unlike a normal litigant who may improperly benefit from an unpaid sanction by retaining it, the Legislature appropriated the sanction dollars—which ultimately are taxpayer dollars collected to provide state-funded services—to the very use the Court directed. It kept nothing for itself. To demand further accounting of the sanction would place form over substance and would provide no benefit to K-12 education in Washington.

Because the Legislature has taken the actions necessary to achieve compliance with the 2012 decision and with article IX, section 1, no further purpose would be served by continuing to require a plan outlining actions to be taken. The order of contempt should be dissolved.

3. The Court Should Relinquish Jurisdiction

The 2017 Legislature did everything it could do within its constitutional power by enacting permanent legislation that requires funding. *See* State's Br. at 32-33.

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[55] Order at 9-10, *McCleary v. State,* No. 84362-7 (Wash. Aug. 13, 2015).

Retaining jurisdiction to ensure that the 2019 Legislature upholds the funding commitment made in EHB 2242 is a road without any end. On this logic, once jurisdiction is retained it could never end, since no current Legislature could ever guarantee action by a future Legislature. If the Court is to require a guarantee of action by a future Legislature as a condition of constitutionality, only permanent retention of jurisdiction would suffice, since only permanently retained jurisdiction could ensure that future Legislatures will meet their constitutional responsibilities. This is a recipe for judicial takeover of the legislative branch of government, and it should be sharply rejected. The time has come in this case for the Court to trust the commitment made by a co-equal branch of government, a commitment that is accompanied by unprecedented increases in funding for K-12 education over a course of years, and by a history of steadfast adherence to the deadlines committed to in ESHB 2261 and SHB 2776.

O. Plaintiff's Request for Remedies Fails to Acknowledge or Address Their Constitutional and Practical Problems

Plaintiffs propose the same remedies as they did a year ago.[56] They again ask the Court to prospectively invalidate or suspend tax preferences or "unconstitutionally funded school statutes" on September 1, 2018, if the Legislature does not "choose" to amply fund the State's basic education

[56] *See* Pls./Resp'ts' 2016 Post-Budget Filing at 48 (June 7, 2016).

program by the end of the 2018 regular legislative session.[57] The State identified the constitutional and practical problems with that proposal last year,[58] and Plaintiffs have offered nothing at all in response.

Because Plaintiffs do not appear to understand the distinction between positive rights and negative restrictions on government action, they misunderstand the options available to the Court. They disregard the Court's careful recognition that this case involves a "'delicate exercise in constitutional interpretation'" that "test[s] the limits of judicial restraint and discretion." *McCleary*, 173 Wn.2d at 519 (quoting *Seattle Sch. Dist. 1 v. State*, 90 Wn.2d 476, 497, 585 P.2d 71 (1978)). The appropriate remedy is one that results in the enactment of legislation that "achieves or is reasonably likely to achieve 'the constitutionally prescribed end'" by 2018, *McCleary*, 173 Wn.2d at 519, not one that turns a blind eye to the historic increase in state funding for K-12 education, including the assumption of compensation costs, or that punishes school children by closing schools.

The State is in compliance. No further remedy is necessary. The Court need not retain jurisdiction any longer. It is time for this case to end.

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[57] Pls.' Br. at 45-47.

[58] State of Washington's Reply Brief and Answer to Amicus Briefs Filed by Arc of Washington et al., Columbia Legal Services et al., Washington's Paramount Duty, and the Superintendent of Public Instruction at 21-27 (June 17, 2016).

III. CONCLUSION

The State has complied with its duty under article IX, section 1 to make ample provision for the education of all children residing within the State of Washington. The Court should dissolve its order of contempt against the State, relinquish jurisdiction, and terminate this appeal.

RESPECTFULLY SUBMITTED this 8th day of September 2017.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the State Of Washington's Reply And Answer To Amici Briefs, via electronic mail, upon the following:

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I certify under penalty of under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of September 2017, at Olympia, Washington.

s/ Wendy R Scharber

WENDY R. SCHARBER
Legal Assistant

APPENDIX

Appendix A : Office of Superintendent of Public Instruction, *Preliminary School District Personnel Summary Reports 2016-17 School Year* (Feb. 2017), http://www.k12.wa.us/safs/PUB/PER/1617/All.pdf Table 34B: Certified Instructional Staff in All Programs

Appendix B: Office of Superintendent of Public Instruction, *Preliminary School District Personnel Summary Reports 2016-17 School Year* (Feb. 2017), http://www.k12.wa.us/safs/PUB/PER/1617/All.pdf Table 36B: Certified Administrative Staff in All Programs

Appendix C: Office of Superintendent of Public Instruction, *Preliminary School District Personnel Summary Reports 2016-17 School Year* (Feb. 2017), http://www.k12.wa.us/safs/PUB/PER/1617/All.pdf Table 38B: Classified Staff in All Programs

Appendix D: Office of Superintendent of Public Instruction, Multi-Year Budget Comparison Tool, www.k12.wa.us/SAFS/17budprp.asp Printout for Tacoma School District, School Year 2018-19, Not Using Caseload Forecasted Enrollment

Appendix E: Office of Superintendent of Public Instruction, "Analysis of Excess General Fund Levies Collectible in 2016" (Dec. 5, 2016), http://www.k12.wa.us/safs/PUB/LEV/1617/1061r.pdf Page 32

Appendix F: Office of Program Research, Washington State House of Representatives, "Estimated Impact for the Policies in the 2017-19 Biennial Budget and EHB 2242" (June 29, 2017), http://leap.leg.wa.gov/leap/Budget/Detail/2017/hoK12 TaxPolicyAnalysis_0629.pdf

Appendix G: Senate Committee Services, Washington State Senate, "Estimated Net State and Local School District Funding Changes Based on 2017-19 State Biennial Budget" (June 29, 2017), http://leap.leg.wa.gov/leap/Budget/Detail/2017/ soK12TotalFunding_0629.pdf (Senate).

Appendix H: Office of Superintendent of Public Instruction,
Multi-Year Budget Comparison Tool,
www.k12.wa.us/SAFS/17budprp.asp
Printout for Chimacum School District,
School Year 2018-19,
Using Caseload Forecasted Enrollment

Appendix I: Office of Superintendent of Public Instruction,
Multi-Year Budget Comparison Tool,
www.k12.wa.us/SAFS/17budprp.asp
Printout for Chimacum School District,
School Year 2019-20,
Using Caseload Forecasted Enrollment

Appendix J: Office of Superintendent of Public Instruction,
Multi-Year Budget Comparison Tool,
www.k12.wa.us/SAFS/17budprp.asp
Printout for Chimacum School District,
School Year 2020-21,
Using Caseload Forecasted Enrollment

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APPENDICES REDACTED

SEE CLERK'S 10/12/2017 NOTATION RULING